

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF VIRGINIA  
Harrisonburg Division

SAMUEL JOSEPH ORLANDO, )  
                                  )  
                                  )  
Plaintiff                    )  
                                  )  
                                  )  
v.                            )                                  Civil Action No.: 5:22-cv-62  
                                  )  
                                  )  
SHERIFF DONALD L. SMITH, et al, )  
                                  )  
                                  )  
Defendants                  )

**DEFENDANTS' BRIEF ON JURISDICTION AND, IN THE ALTERNATIVE,  
REQUEST FOR INDICATIVE RULING PER RULE 62.1**

Defendants, Sheriff Donald L. Smith and Major Brian Jenkins, by counsel, submit the following brief on jurisdiction and, in the alternative, request for indicative ruling per Rule 62.1, and state as follows:

This court has jurisdiction to enter an order ending the *Younger* stay even though its original order is subject to an interlocutory appeal, as such action is collateral to the appeal or aids in the appeal. In the alternative, if this Court decides that it lacks jurisdiction to end the stay, it can issue an indicative ruling by entering an order stating its intent to end the stay which can then be considered by the Fourth Circuit for remand pursuant to Fed. R. Civ. P. 62.1.

Generally, an appeal confers jurisdiction on the court of appeals and divests the district court of its control over *those aspects of the case involved in the appeal*. *United States v. Modanlo*, 762 F.3d 403, 408 (4th Cir. 2014). With regard to interlocutory orders, an appeal from an interlocutory order does not transfer the whole case to the appellate court. "The case, except for the hearing on the appeal from the interlocutory order, is to proceed in the lower court as though no such appeal had been taken, unless otherwise specially ordered." See *Columbus-America Discovery Grp. v. Atl. Mut.*

*Ins. Co.*, 203 F.3d 291, 302 (4th Cir. 2000) quoting *Ex parte Nat'l Enameling & Stamping Co.*, 201 U.S. 156, 162, 26 S. Ct. 404, 50 L. Ed. 707, 1906 Dec. Comm'r Pat. 759 (1906). Furthermore, the Fourth Circuit recognizes that district courts retain jurisdiction to take subsequent action on matters that are collateral to the appeal, or to take action that aids in the appeal. *Co. Doe v. Pub. Citizen*, 749 F.3d 246, 258 (4th Cir. 2014). Allowing the district courts to retain jurisdiction in these areas promotes judicial efficiency and facilitates the division of labor between trial and appellate courts. *Id.*

Here, a decision by the court is collateral to the issues on appeal. The court is not reconsidering its prior order or considering the correctness of the original stay, which is the issue on appeal. Nor is the court modifying its prior order. Rather this court is considering new information to determine whether abstention continues to be warranted, including the length of time the search warrant has been pending without an indictment being issued. The court's decision to review the new information after six months is consistent with the six-month review period set forth in the order and is in furtherance of the court's obligation to avoid an indefinite stay. Whether to end the stay going forward given this new information and/or change in circumstances is collateral to the issues on appeal and thus within the court's jurisdiction to decide.

To the extent ending the stay renders some or all aspects of the appeal moot does not deprive the court of jurisdiction, as such action would "aid in the appeal" by relieving the appellate court from having to consider those issues. Even in cases involving modification of the very order at issue on appeal (which is not the case here), the district court retains jurisdiction to modify those orders when such modification will relieve the appellate court from having to consider those issues on appeal. This includes cases where the district courts modify their injunction orders that were pending on appeal (*Dixon v. Edwards*, 290 F.3d 699, 709 n.14 (4th Cir. 2002); *Lytle v. Griffith*, 240 F.3d 404,

407 n.2 (4th Cir. 2001)); consider motions pursuant to Rule 59(e) to alter or amend the judgment being appealed, or a motion for stay pending appeal (*Wolfe v. Clarke*, 718 F.3d 277, 281 n.3 (4th Cir. 2013)); enter written orders memorializing prior ruling and hearing on issue of attorney-client privilege (*Grand Jury Proceedings Under Seal v. United States*, 947 F.2d 1188, 1190 (4th Cir. 1991)); enforce but not alter or enlarge the scope of judgments that are on appeal (*Springs v. Ally Fin. Inc.*, 657 F. App'x 148, 151 (4th Cir. 2016)); and deny a Rule 60(b) motion for relief from judgment pending an appeal of that judgment. *Fobian v. Storage Tech. Corp.*, 164 F.3d 887, 890 (4th Cir. 1999)).

Other district courts have decided consistently. *Doe v. City of Gauley Bridge*, No. 2:21-cv-00491, 2022 U.S. Dist. LEXIS 197563, at \*2 n.1 (S.D. W. Va. Oct. 31, 2022) (retained jurisdiction to hear dispositive motions filed by defendant during pendency of appeal of dismissal of other defendants); *Hairston v. Wal-Mart Stores E., LP*, No. 2:18cv619, 2022 U.S. Dist. LEXIS 90437, at \*4 (E.D. Va. Mar. 24, 2022)(retained jurisdiction to reconsider dismissal order during pendency of the appeal on that order); *Kadel v. Folwell*, No. 1:19cv272, 2021 U.S. Dist. LEXIS 41528, at \*15 (M.D.N.C. Mar. 5, 2021) (retained jurisdiction to consider motion to amend complaint during pendency of appeal of defendant's sovereign immunity where proposed amendment has no meaningful relation to matters on appeal); *Hunter v. Redmer*, No. JKB-15-2047, 2015 U.S. Dist. LEXIS 165378, at \*5 (D. Md. Dec. 10, 2015) (retained jurisdiction to decide a motion for summary judgment during pendency of appeal on order denying motion for temporary restraining order, which would arguably render the appeal moot).

Alternatively, if this Court decides that it lacks jurisdiction to end the stay, it can issue an “indicative ruling” by stating its intent to end the stay which can then be considered by the Fourth

Circuit for a remand pursuant to Fed. R. Civ. P. 62.1; *see also Fobian*, 164 F.3d at 891 (decided before Rule 62.1 was added). This appears to be the same alternative relief suggested by plaintiff.

WHEREFORE, these defendants respectfully request that this court enter an order ending the stay and setting a hearing on defendants' motion to dismiss, or in the alternative, defendants request an indicative ruling pursuant to Rule 62.1, and request such other and further relief as this court deems appropriate.

SHERIFF DONALD L. SMITH  
and  
MAJOR BRIAN JENKINS,

By Counsel

By: /s/ Rosalie Pemberton Fessier  
Rosalie Pemberton Fessier  
VSB # 39030  
Brittany E. Shipley  
VSB # 93767  
Attorneys for Defendants Smith and Jenkins  
**TimberlakeSmith**  
25 North Central Avenue  
P. O. Box 108  
Staunton, VA 24402-0108  
phone: 540/885-1517  
fax: 540/885-4537  
email: [rfessier@timberlakesmith.com](mailto:rfessier@timberlakesmith.com)  
[bshipley@timberlakesmith.com](mailto:bshipley@timberlakesmith.com)

**TimberlakeSmith**

Staunton, VA  
540.885.1517

CERTIFICATE OF SERVICE

I hereby certify that on December 14, 2023, I have electronically filed this document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

Christopher M. Okay, Esquire  
117 South Lewis Street, Suite 218  
Staunton VA 24401

Zachary Timothy Peter Lawrence, Esquire  
Lawrence Law Firm PLLC  
166 Five Acres Lane  
Cold Brook, NY 13324

Gene Rossi, Esquire  
Carlton Fields, P.A.  
Suite 400 West  
1025 Thomas Jefferson Street, NW  
Washington DC 20007-5208

Amina Matheny-Willard  
Amina Matheny-Willard, PLLC  
999 Waterside Drive, Suite #2525  
Norfolk, VA 23510  
*Counsel for Plaintiff*

A true copy of the foregoing has been emailed to the following pro se parties, at their request:

Rebecca Neal  
2105 Park Ave  
Lynchburg, VA 24501

Bristol Neal  
2105 Park Avenue  
Lynchburg, VA 24501

/s/ Rosalie Pemberton Fessier

Rosalie Pemberton Fessier  
VSB # 39030  
Brittany E. Shipley  
VSB # 93767  
Attorneys for Defendants Smith and Jenkins  
TimberlakeSmith

25 North Central Avenue  
P. O. Box 108  
Staunton, VA 24402-0108  
phone: 540/885-1517  
fax: 540/885-4537  
email: [rfessier@timberlakesmith.com](mailto:rfessier@timberlakesmith.com)  
[bshipley@timberlakesmith.com](mailto:bshipley@timberlakesmith.com)

Timberlake**Smith**

Staunton, VA  
540.885.1517